United States v. Pellicano, No. 04-50043

REINHARDT, Circuit Judge, dissenting:

Pellicano contends that probable cause for the search warrant at issue in this case was completely lacking as a matter of law and that the F.B.I. agents who sought and executed it did not do so in good faith. He is correct on both accounts.

In *United States v. Panaro*, 266 F.3d 939 (9th Cir. 2001) (as amended), "we held that the 'obtaining' element of [18 U.S.C.] § 1951 required that the victim must not only be deprived of property, but that someone must receive the property as a result of the deprivation." Maj. op. at 2 (citing *Panaro*, 266 F.3d at 948). Subsequent to that decision and the search at issue, which occurred in 2002, the Supreme Court confirmed in *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393 (2003), that extortion under the Hobbs Act requires both the deprivation of a property right by the defendant *and* its receipt by him. *See id.* at 403. Our opinion in *Panaro* could not have been clearer on this point: "[S]omeone – either the extortioner or a third person – must *receive* the property of which the victim is deprived." 266 F.3d at 948 (emphasis added).

Here, the affidavit supporting the warrant states that Pellicano hired someone to set the victim-reporter's car on fire and that he may have threatened another reporter to dissuade the two from publishing articles regarding a client. The affidavit

does not, however, state that Pellicano actually appropriated or sought to appropriate any property of the victim, tangible or intangible. The entirety of the allegation is simply that Pellicano sought to dissuade the victim-reporter from exercising her rights or interests, not that he sought to acquire those rights or interests for himself or to have them transferred to a third person. Even today, the government does not allege that Pellicano or any other person sought to receive or received any property of any kind in connection with the criminal conduct alleged in the affidavit. Given that extortion under the Hobbs Act requires receipt by the defendant or a third person of the property of which the victim is deprived (or at least an attempt to obtain that property) and given that the F.B.I. agent who filed the affidavit and sought the warrant failed to allege that Pellicano or any other person received or sought to receive any property of the victim, probable cause for the warrant at issue was completely lacking.

The majority holds that, even if there was no probable cause supporting the issuance of the warrant, the search falls within the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 922 (1984). The "good faith exception" does not apply, however, unless the searching officers' reliance on the warrant was "objectively reasonable." *Id.* Officers are assumed to have a "reasonable knowledge of what the law prohibits." *Id.* at 920 n.20. Moreover, here,

the F.B.I. agent who obtained the warrant was among the searching officers.

Reasonable people could not dispute that the F.B.I. failed to adhere to the law as it existed at the time the warrant in this case was obtained. Our case law clearly established that extortion under the Hobbs Act requires that the victim be deprived of the property *and* that the property be acquired by the defendant or another. *See, e.g.*, *Panaro*, 266 F.3d at 948. We have *never* held that the mere deprivation or loss of a property right, be the right tangible or intangible, is sufficient to constitute extortion under § 1951, where neither the defendant nor a third person acquired or sought to acquire control of the right or interest. *Cf. Panaro*, 266 F.3d at 939; *United States v. Hoelker*, 765 F.2d 1422 (9th Cir. 1985); *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980) (as amended).

The majority attempts to distinguish extortion cases dealing with intangible property rights from extortion cases dealing with tangible property rights, and argues that *Hoelker* and *Zemek* suggest that the *Panaro* rule would not apply where the property at issue is intangible. While *Hoelker* and *Zemek* establish that intangible property rights can be "obtained" within the meaning of § 1951, neither case suggests in any way that merely causing someone to surrender an intangible property right or merely causing the destruction of that right is sufficient, without the concomitant *obtaining* of some property interest by the extortionist or another, to

meet the "obtaining" requirement under the Hobbs Act. Indeed, in both those cases the defendants sought to obtain *for themselves* an intangible property right as a result of their efforts to deprive the victims of their interests. The defendant in *Hoelker* threatened the victim with physical violence in order to cause him to name Hoelker as the beneficiary of his life insurance policy. *See Hoelker*, 765 F.2d at 1424. Likewise, in *Zemek*, the defendants extorted the victim in order to obtain for themselves the goodwill and customer revenues of a competing tavern. *See Zemek*, 634 F.2d at 1173. The defendants in both cases not only sought to compel the victims to relinquish their property, but they sought to acquire the benefits of that property for themselves. In neither case is there any hint of a different rule for tangible and intangible property rights.

All that *Hoelker* and *Zemek* establish is that both tangible and intangible property rights can be extorted under the Hobbs Act. They *do not* eliminate from intangible rights cases the element of the offense that requires that the defendant or a third party receive the extorted property.[1] Nor could any reasonable law enforcement

---

[1]The majority states that "both *Hoelker* and *Zemek* could fairly be read to support the proposition that the destruction of an intangible right was the legal equivalent of appropriating control of the right." Maj. Op. at 5 n.2. There is nothing in either opinion to support this assertion. *Hoelker* and *Zemek* hold only that intangible property rights can be extorted under the Hobbs Act. In other words, they hold that intangible property rights constitute "property" within the meaning of the Hobbs Act. Neither case suggests that the "obtaining" element of § 1951 is eliminated or merges into the "property"

officer have believed in good faith that they did. Far from distinguishing the application of the Hobbs Act to intangible property rights from its application to tangible property rights, the cases cited by the majority hold that both tangible *and* intangible property rights are to be treated in the same manner. In short, the Hobbs Act's "obtaining" element unequivocally applies to both alike.

In the present case, there is no suggestion in the affidavit supporting the search warrant that Pellicano or anyone else sought to receive or received the property right – whether tangible or intangible – that belonged to the victim. Nor could any such allegation have been made, given that the threatened action was intended simply to discourage the victim from publishing an article and not to cause the transfer of any right or interest in property to Pellicano or a third person. Whether the agents relied upon *Hoelker* and *Zemek*, or upon *Panaro*, they could not reasonably have believed that probable cause existed, because there were *no* facts in the search warrant's affidavit suggesting that Pellicano or any third person received or sought to receive any extorted property of the victim.

Hoelker, *Zemek*, and *Panaro* unquestionably governed at the time the warrant

---

element when the property involved is intangible. In both *Hoelker* and *Zemek*, the defendants sought to compel the victims to relinquish their property *and* to acquire the benefits of that property for themselves. Thus, in both cases the defendants met the obtaining requirement. There is no suggestion in the affidavit that Pellicano sought to obtain the property at issue or to acquire its benefits either for himself or a third party.

in this case was issued and executed. Thoughtful, competent, and reasonable judges could not have disagreed that they constituted the clearly established law of this circuit – law of which the officers were deemed to have been aware and which clearly established that the obtaining or receiving of the property of the victim was an element of the offense of extortion. In light of the applicable cases, reliance on the magistrate-judge's issuance of the search warrant was objectively unreasonable.

Additionally, any argument that the F.B.I. agents acted in good faith is foreclosed by *Center Art Galleries-Hawaii v. United States*, 875 F.2d 747 (9th Cir. 1989). There, we held that an officer seeking a warrant who is aware of a potential legal problem must alert the magistrate-judge to the issue "and [] seek specific assurances that the possible defects will not invalidate the warrant," if he is to rely subsequently on the good faith exception. *Id.* at 753-54. Here, there can be little doubt that the agent who obtained the warrant was "keenly aware" of the legal problem created by the established law of this circuit and failed to alert the magistrate-judge to it. The agent "presented his affidavit to the [U.S. Attorney's Office] for multiple levels of review." More specifically, the affidavit was presented to an Assistant U.S. Attorney, a Section Deputy Chief, a Section Chief, and the Chief of the Criminal Division. It was also presented to Senior Litigation Counsel and a Deputy Chief with the Organized Crime and Racketeering Section of the Department of Justice. The affidavit supporting the warrant was approved at each

level. It is inconceivable that the "obtaining" issue did not arise during the course of these reviews, especially given that the Justice Department was litigating that very issue before the Supreme Court in November, 2002, at the time when the F.B.I. presented the Department with the warrant application for review. *See Scheidler*, 537 U.S. 393, *cert. granted*, 535 U.S. 1016 (Apr. 22, 2002). Moreover, the government has not asserted in its brief or at oral argument that the F.B.I. agent who sought the warrant and the reviewing attorneys who approved it were unaware of our decisions in *Panaro*, *Hoelker*, and *Zemek*. As in *Center Art*, there is no suggestion in the record, and the government does not argue, that the agent alerted the magistrate-judge to the legal problem which confronted it or sought his "specific assurances" that the absence of the obtaining element would not "invalidate the warrant." *See United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986). Under these circumstances the government may not rely on the good faith exception. *See Center Art*, 875 F.2d at 753-54.

Despite the majority's assertion to the contrary, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), does not limit our holding in *Center Art* "to preclude it from creating an affirmative duty requiring an officer to notify a magistrate" when a warrant is defective. Maj. Op. at 6 n.4. Quite the opposite! The majority's recitation of *Sheppard* omits the critical portion. It fails to relate that, unlike here and unlike in *Center Art*, the police officer who obtained the search warrant in *Sheppard* notified

the magistrate judge that the warrant application was incorrect in certain respects, and the magistrate judge then assured him that "the necessary changes will be made," and approved the warrant. *See* 468 U.S. at 989. Thus, the Court's refusal to require an officer "to disbelieve a judge who has just advised him . . . that the warrant he possesses authorizes him to conduct the search" was predicated upon the officer's notification to the magistrate judge of the defects in the application that were known to the officer. *Id.* at 989-90. This was likewise precisely the holding of *Center Art*: An officer seeking a warrant who is aware of a potential legal problem must alert the magistrate judge to the issue "and [] seek specific assurances that the possible defects will not invalidate the warrant." 875 F.2d at 753-54. It is also precisely what the officer who obtained the warrant *failed* to do here, and it is precisely why the good-faith exception does *not* apply in this case.[2]

Because *Panaro*, *Hoelker*, and *Zemek* clearly established that the government's Hobbs Act allegations failed to state an offense under § 1951 and the F.B.I. failed to inform the magistrate-judge of the potential defects in the affidavit or advise him that our clearly established case law required that the defendant or a third

[2] The majority also states that "the issue here . . . is not whether the warrant was clearly facially overbroad, but whether it was 'so lacking in indicia of probable cause as to render official belief in it entirely unreasonable." Maj. op. at 6 n.6 (citation omitted). The majority offers no explanation for including this statement in the disposition, and, there appears, in fact, to be none.

party obtain a right to or interest in the extorted property, no offense was adequately alleged, probable cause for the initial search warrant did not exist, and the good faith exception does not apply. Accordingly, I would hold that the initial search warrant was invalid. All the evidence uncovered during the search should be suppressed, and Pellicano's conviction should be reversed. I dissent.